84-1488

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ALEXANDER L. STEVAS,
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GEORGE L. KARAPINKA,

Petitioner

vs.

UNION CARBIDE CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

GEORGE L. KARAPINKA
Petitioner pro se
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5 1/4

QUESTIONS PRESENTED

I. Whether the state statute of limitation can be applied to the assignments of the U.S. patents, which assignments are required by 35 U.S.C. Sec. 261 and which assignments are subject to the ruling of this Court.

II. Whether the court of appeals can grant the motion for dismissal of appeal without considering essential evidence to the contrary which has been readily available to that court and thus violate human rights of the appellant.

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Petitioner pro se prays that a writ of certiorari issue to review the questions presented above.

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the Second Circuit dismissed my appeal by it's Order of December 24, 1984, a copy of which is anexed hereto as a-1*. The Orders of the U.S. District Judge Roger J. Miner are anexed hereto as a-2 and a-11 respectively.

JURISDICTION

The appeal was dismissed by the U.S. Court of Appeals for the Second Circuit on December 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

Statutes

28 U.S.C. Sec. 1254(1): By writ of certi-

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* Appendix below

orari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. Sec. 1338(a): The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights, and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

28 U.S.C. Sec. 2201: In a case of actual contraversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. Sec. 2202: Further necessary or proper relief based on a declaratory judgmant or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

35 U.S.C. Sec. 261: Subject to the provisions of this title, patents shall have the attributes of personal property.

Applications for patents, patents, or any intrest therein, shall be assignable in law by an instrument in writting. The applicant, patentee, or his assigns or legal representatives may in like manner grant and

convey an exclusive right under his application for patent, or patents, to the whole or any specified part of the United States.

A certificate of acknowledgment under the hand and official seal of a person authorized to administer oath within the United States or, in a foreign country, of a diplomatic or consular officer of the United States or an officer authorized to administer oath whose authority is proved by a certificate of a diplomatic or consular officer of the United States, shall be prima facie evidence of the execution of an assignment, grant or conveyance of a patent or a application for patent.

An assignment, grant or conveyance shall be void as against any subsequent purchaser or morgagee for valuable consideration without notice, unless it is recorded in the Patent Office within three months from its date or prior to the date of such subsequent purchase or mortgage.

Rules

Rule 59(e) of Fed. R. Civ. P.: A motion to alter or amend the judgment shall be served no later than 10 days after the entry of the judgment.

Rule 3(d) of Fed. R. Ap. P.: The clerk of the district court shall serve notice of the filing of the notice of appeal by mailing the copy thereof to counsel of record of each party other than the appelant, or, if a party is not represented by counsel, to the party at his last known address; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. (Relavant part)

Rule 10(a) of Fed. R. Ap. P.: Composition of the Record on Appeal. The original papers

and exhibits filed in the district court, the transcripts of proceedings if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Rule 11(b) of Fed. R. Ap. P.: When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. (Relavant part)

STATEMENT OF THE CASE

The Complaint (A-4)*, invoking the jurisdiction of the District Court on the basis of 28 U.S.C. Sec. 1338(a), 2201, 2202, and 35 U.S.C. Sec. 261, and which complaint charged Union Carbide Corporation, defedant-appellee, with illegally obtaining the Assignments (A-8,A-10) to my U.S. Patents No. 3,709,853 and No. 3,756,998 and thus infringing those Patents, had been filed December 19, 1983; the District Court was asked to declare the patent Assignments in A-8 and in A-10 to be null and void. The Complaint also charged that the U.S. Patents listed

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* Appendix to the Court of Appeals Briefs

in Paragraph 7 (A-5) of the Complaint are invalid. The Complaint was dismissed (A-48) for failure to state the claim, with leave to file an amended complaint in 30 days. Motion for reconsideration was denied April 13, 1984 (A-81).

The Amended Complaint, invoking the jurisdiction of the District Court on the basis of 28 U.S.C. Sec. 1338(a), 2201, 2202, and 35 U.S.C. Sec. 261, was filed April 13, 1984. It charges Union Carbide with obtaining the Assignments (A-74, A-76) of my U.S. Patent Applications No. 138,611 and No. 767,508 which have resulted in U.S. Patents No. 3,709,853 and No.3,756,998 respectively, contrary the decision of this Court in United States v. Dubilier Condenser Corp., 1932, 289 U.S. 178, 186-9, and thus with infringing these Patents by licensing the inventions contained therein and collecting revenue and royalties from those licenses. I pray the District Court in my Amended Com-

plaint to declare the Assignments of these Patents, which have been recorded in the U. S. Patent Office in accordance with 35 U.S. C. Sec. 261, to be null and void and to declare the titles to these Patents to be mine and to order Union Carbide to transfer to me all the revenue and royalties derived from those licenses. I am also asking the District Court to declare U.S. Patents in Paragraph 11 (A-72), which have been issued to Union Carbide, to be invalid because they disclose and/or claim my inventions which are unpatented by me without listing me as an inventor or a coinventor. The Amended Complaint was dismissed for failure to state the claim on July 10, 1984 (a-6), entered July 11, 1984; motion for reconsideration was denied August 3, 1984 (a-11), entered August 15, 1984. Notice of Appeal was filed August 28, 1984 (A-157).

In my Amended Complaint (A-70), which had been filed April 13, 1984 after the mo-

tion to reconsider was denied in which motion I was not permitted by the District Court to make any argument in support of that motion, I showed specific illegal acts of Union Carbide which made the Assignments in A-74 and in A-76 null and void, manely that my signing of those Assignments had been contrary to this Court's decision in United States v. Dubilier Condenser Corp., supra, because I had not been employed by Union Carbide to invent the assigned inventions; I had invented these inventions on my own time and outside of my employment (A-70, 71). I also showed there that Union Carbide was infringing my U.S. Patents No. 3,709,853 and No. 3,756,998 by licensing the inventions contained therein and collecting revenue and royalties from those liceses.

Since Union Carbide did not respond in any way in over 20 days to my Amended Complairt, I served by first class mail on May 4, 1984 my motion for judgment by default

(A-82) supported by my Affidavit, in accordance with Rule 55(b)(2). My motion was based on Rule 55(a) which requires responsive pleading within 10 days of service of amended pleading, that is my Amended Coplaint. On May 7, 1984 Union Carbide served its motion for partial dismissal of my Amended Complaint under Rule 12(b)(6) and for a more definite statement under Rule 12(e) (A-92). During the oral argument on May 25, 1984 Union Carbide claimed that the Amended Complaint was not an amended pleading. Contrary to its previous ruling on April 13, 1984 (A-66 lines 17,18) District Court denied my Motion for Judgment by Default(a-5). Union Carbide, further, without any basis maintained that the Assignments in Exhibits A (A-74) and B (A-76) of my Amended Complaint are "contracts" and therefore the action is barred by the New York statute of limitations. The District Court without permitting me to make my argument, stopped the

proceedings and reserved the judgment.

The Chamber Order dealing with the Court proceedings on May 25, 1984 was issued July 10, 1984, entered July 11, 1984 (a-2). Contrary to its earlier ruling (A-66) District Court ruled that the Amended Complaint was not an amended pleading and therefore Rule 15 did not apply. District Court also dismissed the Amended Complaint for failure to state the claim on the erroneous basis that an assignment of patent is a contract (a-7). I was directed to provide Union Carbide with a more definite statement in 30 days about my unpatented inventions, although the term "unpatented invention" was plenty definite to plead responsevely.

July 19, 1984 I filed my motion for reconsideration of District Court's Order of July 10, 1984 under Rule 59(e). In my moving papers (A-127) I showed that the source of my claim are the Acts of Congress and the ruling of this Court in United States v.

Dubilier Condenser Corp., supra, but no diversity of citizenship. I also stated there that the statement in my Amended Complaint regarding my "unpatented inventions" was definite enough to plead pesposively and that at that time it was impossible for me to supply a more definite statement than "unpatented inventions" of my Amended Complaint (A-130). During the oral argument on August 3, 1984 I was interrupted by the District Court and I was not permitted to complete my argument. District Court denied my motion for reconsideration, motion under Rule 59(e) (a-11).

The entire Amended Complaint was dismissed for failure to state the claim on July 10, 1984 including the portion of the Amended Complaint dealing with Union Carbide's Patents which contain my "unpatented inventions". Union Carbide for the purpose of delay needlessly filed its Motion under Rule 12(b)(6) for Dismissal of those Claims of

the Amended Complaint Relating to Plaintiff's "Unpatented Inventions". Those "unpatented inventions" were already dismissed July 10, 1984 (a-9).

My Notice of Appeal was mailed to the Clerk of the U.S. District Court in Albany, N.Y. on August 21, 1984. On August 23, 1984 I received the telephone call from the Clerk's Office in Albany, N.Y. stating that my Notice of Appeal was received by that Office and requesting the appeal's fee of $70.00. This Notice of Appeal, however, was filed August 28, 1984 (A-157).

The transcripts of the District Court's proceedings on May 25, 1984 and on August 3, 1984 which show that I was not permitted by the District Court to be heard, had been ordered August 27, 1984; they were never made part of the record on appeal before the dismissal of the appeal, contrary to Rule 10(a) of the Federal Rules of Appellate Procedure (F.R.A.P.). My Affidavit in opposition to

Union Carbide's Motion for Dismissal of the Appeal (a-12) which awers the fact that I have been prevented by the District Court to make my arguments on May 25, 1984 and on August 3, 1984, was not filed by although submitted to the Court of Appeals and therefore was not considered by that Court. See Court of Appeals' Doket Entries. This readily available evidence, showing that the appeal was proper in accordance with the ruling of this Court in Cohen v. Beneficial Loan Corp., 1948, 337 U.S. 541, 546-7 was not before the Court of Appeals at the time of the dismissal of the appeal.

The act which is contrary to Rule 3(d) of F.R.A.P. has been committed by the District Court; it did not transmit the copy of the Notice of Appeal, which had been filed August 28,1984, nor the copy of the District Court's Docket Entries to the Court of Appeals. I had to file, therefore, on October 26, 1984 the motion in the District Court

to accomplish that transfer (a-13). Court of Appeals' Scheduling Order #1 was issued November 9, 1984.

On November 30, 1984 Union Carbide filed its motion for dismissal of my appeal alleging that it was premature under Rule 54(b) of F.R.C.P., but without filing a Notice of Appearence for any of its attorneys.

To make the transcripts of the District Court's proceedings on May 25, 1984 and on August 3, 1984 a part of the record on appeal, before the ruling of the Court of Appeals on Union Carbide's Motion to Dismiss the Appeal, I mailed to the Clerk of the Court of Appeals on December 20, 1984 my Motion for Direction of the Clerk of the Court of Appeals to obtain those transcripts. This Motion of mine was totally ignored by the Court of Appeals. These transcripts, the copies of which I obtained November 26, 1984, contain numerous misleading errors. The corection of these errors

was entered on pages 8-9 of the Brief of Appellant George L. Karapinka which had been filed in the Court of Appeals on December 17, 1984.

On January 8, 1985 I received in the mail the Court of Appeals' Order granting Union Cabide's Motion for Dismissal of the Appeal which had been entered on December 24, 1984 (a-1). My untimely Motion for Rehearing in accordance with Rule 59(e) of F. R.C.P. had been mailed to the Court of Appeals on January 9, 1985; it was not dismissed yet.

ARGUMENT

I. STATE STATUTE OF LIMITATION CAN NOT BE APPLIED TO THE ASSIGNMENTS OF THE U.S. PATENTS, WHICH ASSIGNMENTS ARE REQUIRED BY 35 U.S.C. Sec. 261 AND WHICH ASSIGNMENTS ARE SUBJECT TO THE RULING OF THIS COURT

The lower Court had ruled on that issue in conflict with the decision of this Court in Waterman v. Mackinzie, 1890, 138 U.S. 252, 255, Crown Die & Tool Co. v. Nye Tool

and Machine Works, 1923, 261 U.S. 24, 33, and in United States v. Dubilier Condenser Corp. 1932, 289 U.S. 178, 186-9.

The ruling of this Court on the above issue is very important to the economic growth of the United States. The Court of Appeals dismissed my appeal without ruling on the issue. Writ of certiorari, which is my only legal remedy now, is therefore requested from this Court in accordance with 28 U.S.C. Sec. 1254(1).

The Congress created the patent system to stimulate the inventorship and through it the rapid expansion of industry and economy of the United States. This patent system warked well in the past when an independent inventor could develop relatively inexpensively his invention. But in recent years the development of a scientific invention requires sophisticated equipment and research facilities which are not readily avaluable to an independent inventor. The

great majority of the inventors, or potential inventors are therefore employed by the institutions that can efford this equipment and research facilities. Because the great majority of employed inventors are not realistically compensated for their inventions by ther employers ($1.00 or some other token compensation is not considered to be realistic) there is no incentive for them to invent and the United States has fallen therefore behind in many technological areas behind Japan and West-European countries whose employed inventors are required by law to be compensated realisticaly by their employers for their inventions. In some cases the employer in the United States considers it to be advantageous for him to dismiss the inventor, while retaining title to the invention without any compensation to the inventor; the situation that is the part of this Petition. That type of treatment of the employed inventor does not

create incentive to invent but discourages inventorship.

The result of this lack of compensation of employed inventors for ther inventions in this Country is the rapid narrowing of the once wide technological gap between United States and Japan and other western countries or in some technologies falling of United States behind those countries. To help to reverse this trend this Court should, therefore, grant this Petition and reafirm and reinterpret this Court's ruling in United States v. Dubilier Condenser Corp. supra, in accordance with which the employed inventor, absent an employment contract, has the title to his patented invention which was invented outside of his employment but developed with the resources of his employer. In accordance with this decision the employer has the nonexclusive license of the invention, and the inventor gets the royalties from other licensing.

The ruling of the District Court on my Amended Coplaint (A-70) is, therefore, against the decision of this Court.

Therefore, to stimulate inventorship and through it technological expansion and economic growth of the United States, it is essential that this Court grants this petition for certiorari and reafirms and reinterprets its ruling in United States v. Dubilier Condenser Corp., supra.

Certiorari should also be granted because the District Court misinterpreted 35 U.S.C. Sec. 261 in its ruling that all the assignments are contracts and terefore the assignments of my U.S. Patents No. 3,709,853 (A-74) and No. 3,756,998 (A-76) are contracts and not assignments required by 35 U.S.C. Sec. 261. This District Court's ruling (a-6) is also contrary to the decision of this Court in Crown Die & Tool Co. v. Nye Tool and Machine Works, 1923, 261 U.S. 24, 33 and in Waterman v. Mackenzie, 1890, 138

U.S. 252, 255. This Court in Crown Die & Tool Co. v. Nye Tool and Machine Works, supra, makes a very clear distiction between the patent assignment and a contract involving patents. This Court is stating there that a patent assignment can not be a contract at the same time and that a law suit involving the validity of a patent assignment is a question arising under patent laws. That is exactly the situation in my case. If the Assignments in A-74 and in A-76 are valid the District Court should have ruled one way and if they are invalid, the other way. Therefore no New York statute of limitation is applicable. Previously this Court in Waterman v. Mackenzie, supra, defined patent assignments: "The patentee or his assigns may by instrument in writting, assign, grant and conway, either, 1st, the whole patent, comprising the exclusive righ to make, use and vend the invention through the United States;"... This definition fits

the Assignments of my Patents in A-74 and in A-76 perfectly. See also Crown Die & Tool Co. v. Nye Tool and Machine Works, supra at 37. In view of those two decisions of this Court no New York statute of limitation can possibly be applied to the Assignments of my Patents No. 3,709,853 (A-74) and No. 3,756,998 (A-76). These Assignments assigned to Union Carbide my U.S. Patent Applications No. 138,611 and No. 767,508 respectively, on the basis of which those Patents were granted. The examination of these Patent Assignments clearly show that they are not contracts. Firstly the title: "Assignment of Invention, Priority Rights and Rights to Apply for Patents" and secondly, the last paragraph of these documents "Acceptance. We the undersigned Union Carbide Corporation of 270 Park Avenue, New York, State of New York, United States of America do hereby declare that we have accepted the foregoing assignment"(emphasis added) clear

ly state that these documents are assignments and nothing else. The authenticity of these documents, as true copies of the originals required by 35 U.S.C. Sec. 261, was never questioned by Union Carbide or District Court, otherwise I could have submitted the certified copies of these Assignments.

The reliance of the District Court in its Order of July 10, 1984 (a-7) on Perma Research & Development Co. v. Singer Co., 402 F. Supp. 881 (S.D.N.Y. 1975); 542 F.2d 111 (2d Cir.) and on United States v. Dubilier Condenser Corp., 289 U.S. 178, 187 is erroneous. In Perma, supra, the patent assignment as a separate and distinct entity was a part of contract. The validity of that assignment was never in question. This contract also involved royalties by contract (see Crown v. Nye, supra), payment of debt, and etc.. It is a pure breach od contract action. This decision does not have

any relevance to this case. The District Court's interpretation of United States v. Dubilier Condenser Corp., supra is not valid because there is no valid employment contract, or any contract between myself and Union Carbide. The Amended Complaint, Paragraphs 2, 3, and 4 (A-70,71), clearly shows that my employment with Union Carbide was general one and that I was not hired to invent the inventions of U.S. Patents No. 3,709,853 and No. 3,756,998, and that I invented them outside of my employment. Those Assignments (A-74,76) in accordance with United States v. Dubilier Condenser Corp., 289 U.S. 178, 186-9, are null and void.

The Assignments in A-74 and A-76 are obviously assignments as defined by Crown and Waterman, supra and required by 35 U.S.C. Sec. 261. These documents are only required by that statute and have been recorded in accordance with that statute only in the U. S. Patent Office as the stamps of that Offi-

ce on them clearly show. Therefore no statute of limitation of the State of New York can be applied to those documents. Support for this fact is also found in Deitrick v. Greaney, 1940, 309 U.S. at 200. In that decision the operation of 12 U.S.C. Sec. 83 and other Sections were under consideration. In my case the operation of 35 U.S.C. Sec. 261 is under consideration. Both 35 U.S.C. Sec. 261 and 12 U.S.C. Sec. 83 are the Acts of Congress to which no statute of any state can be applied.

In my Amended Complaint I pray the District Court (A-73) to declare my Assignments of U.S. Patents No. 3,709,853 and No. 3,756,998 to be null and void and to declare the titles to those Patents to be mine. If the Assignments in A-74 and A-76 are not the assignments required by 35 U.S.C. Sec. 261, then Union Carbide has to produce other assignments in order to have titles to those Patents, otherwise the titles to them are

mine. If the Assignments in A-74 and A-76 are the assignments required by 35 U.S.C. Sec. 261 then the District Court should have ruled in accordance with this Court in Crown v. Nye, at33 and 37, supra and in Waterman v. Mckenzie, at 255, supra, should have found the Assignments invalid in accordance with United States v. Dubilier Condenser Corp., at 186-9, supra, should have declared the titles to those Patents to be mine, and should have declared the royalties from licensing of those Patents to be mine. In any event the Amended Complaint constitutes a sufficient complaint in accordance with Conley v. Gibson, 1957, 355 U.S. 41 and the dismissal for failure to state the clain of my Amended Complaint by the District Court was totally groundless.

I, therefore, pray this Court to grant this Petition for a Writ of Certiorari which is my last legal remedy, otherwise I will suffer irreparable harm.

II. COURT OF APPEALS CAN NOT GRANT THE MOTION FOR DISMISSAL OF APPEAL WITHOUT CONSIDERING ESSENTIAL EVIDENCE TO THE CONTRARY WHICH HAS BEEN READILY AVAILUABLE TO THAT COURT OTHERWISE THAT COURT VIOLATES HUMAN RIGHTS OF THE APPELLANT

This appeal which was filed timely (a-12) had been dismissed on a nonexistant technicality contrary to the instructions of this Court to the Court of Appeals. Foman v. Davis, 1962, 371 U.S. at 181-2; Brown Shoe Co. v. United States, 1961, 370 U.S. 294, 306; Conley v. Gibson, 1957, 355 U.S. 41, 48.

Cotrary to the contention of Union Carbide that my appeal was premature, my appeal was timely. No proceedings on my Amended Complaint, which had been dismissed on July 11, 1984, was held in the District Court after the filing of my Notice of Appeal. My Notice of Appeal was filed August 28, 1984 after the entry of all of the District Court's Orders concerning the dismissal of my Amended Complaint (a-12). See District Court's Doket Entries A-3. Since the District Court

dismissed my entire Amended Complaint, this appeal is final and the dismissal of this appeal does not return this case to the District Court for continuation, because there is nothing to continue there. See the District Court's Docket Entries A-3. I did not receive a copy of judgment referred to by Union Carbide on page 4 of its memorandum in support of its motion for dismissal of my appeal (a-12). All the claims of my Amended Complaint were dismissed by the District Court's Order of July 10, 1984 (a-6) where the District Court found the patents containing my unpatented inventions to lack the controversy for purposes of a declaratory judgment (a-9), thus the claims to the se unpatented inventions had been dismissed July 10, 1984. No Act of Congress or any other statute gives the District Court jurisdiction to grant or dismiss a claim to the title of an unpatented invention.

I am respectfully requesting this Court to consider a number of authorities which

state that a mistake, if I committed one which I do not think I did, in filing a notice of appeal should not result in loss of the appeal. Foman v. Davis, 1962, 371 U.S. at 181-2, Brown Shoe Co. v. United States, 1961, 370 U.S. 294, 306, Conley v. Gibson, 1957, 355 U.S. 41, 48. Particularly applicable here is 9 Moores Federal Practice (2d Ed.) 203.18 (3-76) which states:

> "The rule is now well settled that a mistake in designating the judgment, or in designating a part appealed from if only a part is designated, should not result in loss of the appeal as long as the intend to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake. Decisions to the contrary can no longer be regarded as authoritative."

This appeal is proper under 28 U.S.C. 1291 in accordance with the ruling of this Court in Cohen v. Beneficial Loan Corp., 1948, 337 U.S. 541, 546-7. As shown in my Affidavit which was submitted in opposition to Union Carbide's motion for dismissal of my appeal and which Affidavit was never filed by the Clerk of the Court of Ap-

peals, I was not permitted by the District Court to present my arguments on May 25, 1984 and on August 3, 1984 (a-13). This denial by the District Court of my human righ to present my arguments makes this District Court's decision final in accordance with Cohen, supra at 546.

The essential transcripts of District Court proceedings of May 25, 1984 and of August 3, 1984 (a total of 19 pages), during which proceedings I was not permitted to make my arguments, were ordered by me on August 27, 1984 (a copy of that order was send to the Clerk of the District Court) as Court of Appeals' Transcript Information Form D shows. These transcripts in spite of my efforts were never made part of the record on appeal. The motion to direct the Clerk of the Court of Appeals to obtain and to file these transcripts was mailed by me to the Clerk of the Court of Appeals on December 20, 1984. The Court of Appeals, the-

refore, ruled on the motion to dismiss my appeal on December 24, 1984 in the pendency of this motion to obtain these essential to this ruling transcripts.

The Court of Appeals did not therefore consider the essential evidence contained in my Affidavit (a-12), submitted to the Court of Appeals in opposition to Union Carbides motion to dismiss my appeal, and which Affidavit was not filed by the Clerk of the Court of Appeals and the essential evidence conteined in the transcripts of District Court's proceedings of May 25, 1984 and of August 3, 1984 which had been ordered by me but had not been included by the Clerk of the District Court into the record on appeal. This act of the Clerk of the District Court is contrary to Rules 10 (a) and 11(b) of F.R.A.P. By not considering this essential evidence, evidence which would not have permitted the Court of Appeals to dismiss my appeal, the Court of

Appeals violated my human rights. The District Court violated my human rights by refusing to hear my arguments on May 25, 1984 and on August 3, 1984 (a-13). The right of the litigant to be heard by the court is the human right universally respected by the courts of all the civilized countries. Therefore, if this Court does not grant this Petition for a Writ of Certiorari my human rights will irreparably be violated.

On the basis of these and the following facts this Court should grant this Petition for a Writ of Certiorari.

The Court of Appeals considered Union Carbide's motion for the dismissal of my appeal without the Notice of Appearence for any of Union Carbide's attorneys. See the Court of Appeals' Docket Entries.

The Clerk of the Court of Appeals by supplying me with the copy of that Court's Order of dismissal of my appeal (a-1) 15 days after that Order had been entered made

it impossible for me to file a timely Motion for Rehearing in accordance with Rule 59(e) of Federal Rules of Civil Procedure.

CONCLUSION

For all the foregoing reasons, I the petitioner respectfully request this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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26505

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Karapinka, plaintiff-appellant
v.
Union Carbide Corporation,
defendant-appellee

84-7916

Motion for Dismissal of the Appeal

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED

DEC. 24 1984

Elaine B. Goldsmith, Clerk

x Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

x Amalva L. Kearse
Amalva L. Kearse, U.S.C.J.

12/24/84
Date

x Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GEORGE L. KARAPINKA
Plaintiff

-against-

No. 83-CV-16
1682

UNION CARBIDE CORPORATION,
Defendant

APPEARANCES: OF COUNSEL:

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ROGER J. MINER, D.J.

ORDER

I

Plaintiff, appearing pro se, commenced this action on December 19, 1983 alleging various causes of action against defendant Union Carbide relating to certain of his in-

ventions and discoveries, some of which had been patented by him. On March 30, 1984, this Court granted defendant's motion to dismiss, Fed. R. Civ. P. 12(b)(6), allowing thirty days in which to replead. On April 13, 1984, the Court denied from the bench plaintiff's motion for reconsideration of the March 30th Order and allowed plaintiff an additional thirty days to replead his complaint. Plaintiff then served and filed an "amended" complaint the same day. That complaint is the subject of the present motion.

II

Plaintiff's repleaded complaint alleges that while employed by defendant as a chemist, but independent from his employment duties, he discovered and patented certain inventions. In 1973, plaintiff apparently assigned one of those patents to defendant Union Carbide. Plaintiff had previously assigned other patents to Union Carbide in 1968 and 1971. The gravamen of plaintiff's

complaint is that these assignments were made "contrary to the decisions of the United States Courts, United States v. Dubilier Condensed (sic) Corp., 1932, 289 U.S. 178 at 186-189," since he was not hired to discover or patent those items. Moreover, plaintiff claims that he signed those assignments under threat of dismissal and did not receive consideration therefor. Finally, plaintiff claims that although he was told by company officials that he had a right to be recalled to work following his discharge in October of 1981, in fact he never was.

Plaintiff seeks a declaration that his assignments to Union Carbide are null and void and that title to those patents properly should vest in him. He also requests that defendant transfer to him "all the revenue and royalties (with appropriate interest), derived from licensing worldwide (his) inventions...."

III

Defendant Union Carbide moves this Court

for an order pursuant to Fed. R. Civ. P. 12 (b)(6) dismissing parts of plaintiff's complaint as well as for an order pursuant to Fed. R. Civ. P. 12(e) requiring plaintiff to provide a more definite statement regarding the remainin claims. Plaintiff moves for an order pursuant to Fed. R. Civ. P. 55 entering a default judgment in his favor. For the reasons set forth below, defendant's motions are granted in their entirety and plaintiff's motion is denied.

A. Default judgment

Plaintiff served and filed the present complaint on April 13, 1984. Defendant moved to dismiss the complaint, Fed. R. Civ. P. 12(b)(6), on May 7, 1984. Relying on Fed. R. Civ. P. 15, plaintiff seeks a default judgment based on defendant's failure to answer or otherwise move within ten days of service of the complaint. Plaintiff's motion must be denied for two reasons: First, plaintiff never requested that the clerk enter defendat's default. Fed. R. Civ. P. 55(a).

Default not having been entered, entry of default judgment is inappropriate. Second, and in any event, defendant's motion to dismiss was timely made. Because the present complaint is not an amended complaint governed by Fed. R. Civ. P. 15's ten day requirement for filing responsive pleading, but rather a repleaded complaint, defendant was entitled to twenty days in which to respond Fed. R. Civ. P. 12. Decause service of the complaint was effected by mail, defendant was entitled to an additional three days. Fed. R. Civ. P. 6. The twenty-third day following service of plaintiff's complaint fell on Sunday, May 6th. Rule 6 directs in such circumstances that filing will be timely if made on the next business day, in this case Monday, May 7th. Since defendant's response on May 7th was timely, plaintiff's application for default judgment must be denied.

B. Motion to dismiss

With respect to plaintiff's claims regarding the assignments of his patents, it is

clear that plaintiff seeks nothing more than rescision of those contracts based on allegations of duress, illegality or lack of consideration. Plaintiff has consistent ly adhered to his claim, despite repeated inquiries from the Court, that fraud on the part of defendant is neither in issue nor alleged in his complaint. Because plaintiff's action is founded upon a contract, see United States v. Dubilier Condenser Con 289 U.S. 178, 187 (1933) (assignment of patent is contractual in nature); Perma Research & Development Co. v. Singer Co., 402 F. Supp. 881 (S.D.N.Y. 1975), aff'd, 542 F.2d 111 (2d Cir.), cert. denied, 429 U.S. 987 (1976) (same), it is subject to a six-year statute of limitations. N.Y. Civ. Prac. Law § 213 (McKinney Supp. 1983-1984). Because the acts of which plaintiff complaints occured, and therefore his cause of action accrued, no later than January 19, 1973, see Amended Complaint, 6, those claims are ti-

me-barred.

Plaintiff's continued relience on the decision in United States v. Dubilier Condenser Corp., 289 U.S. 178 (1933) is simply misplaced. That decision holds only that while one employed to make an invention in the service of his employer is "bound to assign to his employer any patent obtained," 289 U.S. at 187, one whose employment is "general" is not so required. Id. The decision does not preclude an employee from entering into an independent contract with his employer for the assignment of a patent See id. at 187-88 (a "'corporation which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect

(emphasis added) (quoting Dalzell v. Deuber Watch Case Manufacturing Co., 149 U.S. 315, 320 (1893)).

With respect to that portion of plaintiff's complaint seeking a declaration that defendant's patents are invalid, such claim cannot be maintained since defendant has not accused plaintiff of patent infringement, Walker Process Equipment, Inc. v. FMC Corp. 356 F.2d 449, 451 (7th Cir.) cert. denied, 385 U.S. 824 (1966), and there is therefore no controversy for purpose of declaratory judgment.

c. Motion for a more definite statement

With respect of what remains of plaintiff's repleaded complaint, and that is not at all clear, the Court is constrained to grant defendant's 12(e) motion, and hereby directs plaintiff to provide a more definite statement regarding what appears to be claims against defendant for patent infringement. If, as the Court suspects, the complaint contains no claims other than those

seeking rescissins of the assignments and a declaration of patent invalidity, needless to say the complaint will be subject to dismissal in its entirety with prejudice. Further repleading will not be permitted, plaintiff now having had more than ample opportunity to present any viable claims he may have.

IV

For the forgoing reasons, plaintiff's motion for default judgment is denied. Defendant's to dismiss those claims relating to the assignment of plaintiff's patents and to a declaration of patent invalidity is granted. Similarly, defendant's motion for a more definite statement with respect to any remaining claims also is granted and plaintiff is directed to provide such a statement within thirty days after the date of this Order.

It is so ordered.

Dated: July 10, 1984
Albany, New York

x Roger J. Miner
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GEORGE L. KARAPINKA, Plaintiff	COPY
v.	C.A. No. 83-CV-1682
UNION CARBIDE CORPORATION, Defendant	Hon. Roger J. Miner

U.S. DISTRICT COURT
N.D. OF N.Y.

FILED

AUG 15 1984
AT ___ O'CLOCK ___.M.
J.R. SCULLY, Clerk
ALBANY

ORDER

Plaintiff having moved for reconsideration of this Court's ruling of July 10, 1984, and the matter having been fully briefed and having come on for hearing before this Court on August 3, 1984;

IT IS HEREBY ORDERED that the plaintiff's motion for reconsideration is denied.

Dated: Aug 13, 1984

x Roger J. Miner
United States District Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

GEORGE L. KARAPINKA, Appellant vs. UNION CARBIDE CORPORATION, Appellee	)	No. 84-7916

AFFIDAVIT OF GEORGE L. KARAPINKA

State of West Virginia)
County of Monongalia)

George L. Karapinka of full age being duly sworn upon his oath, deposes and says

1. I make this Affidavit in opposition to Motion of Defendant-Appellee Union Carbide Corporation for Dismissal of the Appeal for Lack of Jurisdiction

2. My Notice of Appeal was filed and entered on the Docket in the U.S. District Court for the Northern District of New York on August 28, 1984, NR 35, after the entry of all the District Court's Orders. See the attached Exhibit.

3. I did not receive a copy of the judgment referred to by Union Carbide Corporation on page 4 of it's memorandum in

support of this Motion.

4. My appeal's fee of $70.00, $5.00 filling fee and $65.00 docketing fee was paid on August 28, 1984. The transcripts of District Court's proceedings on May 25, 1984 and on August 3, 1984 were ordered on August 27, 1984.

5. On November 9, 1984, the argument day on my Motion for the Order Directing the Clerk of the United States District Court Albany, N.Y. to Transmit the Notice of Appeal to United States Court of Appeal for the Second Circuit in accordance with Rule 3(d) of Federal Rules of Civil Procedure, I was told by the District Court that my appeal was in order in the Second Circuit. The Motion was dismissed without prejudice, as moot.

6. During my argument in opposition to Union Carbide Corporation's Motion Under Rule 12(b)(6) for Partial Dismissal of the Amended Complaint and for a More Definite

Statement under Rule 12(e) on May 25, 1984 I was interrupted and not permitted by the District Court to complete my argument.

7. During my argument in support of my Motion to Reconsider District Court's Judgment of July 10, 1984 on August 3, 1984 I was interrupted and not permitted by the District Court to complete my argument.

x George L. Karapinka

George L. Karapinka

Sworn and subscribed
before me this 4th day
of December, 1984

x G. Gayle McBee

Official Seal
NOTARY PUBLIC
State of West Virginia
G. GAYLE McBEE
c/o The First National Bank of Morgantown
P.O. Box 853
Morgantown, WV 26507
My Commission Expires Sept. 7, 1994